Supreme Court, U. S.
FILED
AUG 12 1980
MICHAEL RODAK, JR., CLERK

No. 79-1867

In the Supreme Court of the United States

OCTOBER TERM, 1979

LEWIS E. JONES, PETITIONER

v.

CLIFFORD L. ALEXANDER, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

WILLIAM KANTER
LOUIS R. DAVIS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1867

LEWIS E. JONES, PETITIONER

v.

CLIFFORD L. ALEXANDER, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether petitioner was properly released from active duty pursuant to procedures fashioned by the Secretary of the Army to reconstruct the deliberations of Army selection boards that had been improperly constituted.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 6

TABLE OF AUTHORITIES

Cases:

Dilley v. *Alexander*, 603 F. 2d 914 ..... 2, 4, 5

Doyle v. *United States*, 599 F. 2d 984, cert. denied, No. 79-1315 (June 2, 1980) 2, 4, 5

Statutes:

10 U.S.C. 266 ..... 1, 2

10 U.S.C. 1552 3

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-35) is reported at 609 F. 2d 778.[1] The opinion of the district court (Pet. Supp. App. 2-4) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1980. A petition for rehearing was denied on February 14, 1980 (Pet. App. 36-37). The petition for a writ of certiorari was filed on May 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Army officers serving on active duty, both Regular and Reserve, may obtain promotions to temporary rank in the Army of the United States. Periodically, officers are considered for such promotions by Army selection boards based upon thier service record. Congress has provided that these selection boards, when considering the promotion of Reserve officers, must include in their membership an appropriate number of Reserves. 10 U.S.C. 266. Officers eligible to be selected for temporary promotion are separated into two "zones of consideration," a primary zone for more senior officers and a secondary zone for more junior officers. Selection boards are limited as to the total number of officers they may select for promotion and are further limited as to the number of officers who may be selected from the secondary zone. Army regulations provide that a primary zone Reserve officer who is twice passed over for a

---

[1] We note that petitioner's reproduction of the court of appeals' opinion, in addition to numerous other errors, omits all seven of the footnotes included in that opinion. Citation to the footnotes will be made to the official report of the opinion.

temporary promotion will be released from active duty. Secondary zone officers who are not selected for promotion, however, are not considered "passed over" for purposes of release from active duty (Pet. App. 20-21; 609 F. 2d at 780 n.2).[2]

Petitioner, a warrant officer in the United States Army Reserve, was considered and passed over for temporary promotion by a selection board convened in 1975 and then again by a board convened in February 1976. The selection boards convened in 1975, however, had been improperly constituted in that they had not contained any Reserve officers as required by 10 U.S.C. 266.[3] Accordingly, some 1,300 primary zone officers, including petitioner, filed applications with the Army Board for the Correction of Military Records (ABCMR) to set aside their passovers by the 1975 promotion boards because of defects in the proceedings of the boards, including their failure to contain Reserve officer membership (Pet. App. 20-21).

Pursuant to the ABCMR's recommendation, the Army convened new boards containing Reserve officers to reconsider all primary zone officers considered by the original 1975 boards. These "Relook Boards" used records reconstituted to appear as they had in 1975 and followed the identical letter orders of instructions and guidance previously furnished to the original 1975 boards. The Relook Boards selected some officers who had been passed over by the original boards, and those officers

---

[2]As noted by the court of appeals (609 F. 2d at 780 n.1), the Army's promotion system is "well-detailed" in two other opinions discussing related issues, *Dilley* v. *Alexander*, 603 F. 2d 914 (D.C. Cir. 1979), and *Doyle* v. *United States*, 599 F. 2d 984 (Ct. Cl. 1979), cert. denied, No. 79-1315 (June 2, 1980).

[3]Different selection boards consider different classes of officers. Petitioner was considered by the warrant officer selection board.

were retroactively promoted as if they had been selected by one of the original 1975 boards. Petitioner and other officers, however, were passed over by the Relook Boards as well. The ABCMR held that these officers were not entitled to correction of their records. Thereafter, in November 1976, petitioner was notified that he would be released from active duty (Pet. App. 21-22).

Shortly before his scheduled release date, petitioner brought this action in the United States District Court for the Middle District of Georgia seeking declaratory relief and an injunction barring his release from active duty on the ground that "a passover" by an original 1975 board or by a Relook Board was not a valid basis for release.[4] Petitioner's requests for a temporary restraining order and a preliminary injunction were denied, and he was released from active duty (Pet. App. 22). Subsequently, in a brief memorandum opinion, the district court granted the Army's motion for summary judgment (Pet. Supp. App. 2-4).

The court of appeals affirmed (Pet. App. 18-35). The court rejected petitioner's contention that, in light of the 1975 compositional defect, he could not be released from active duty until he had been passed over by two other regularly scheduled selection boards. It held that the Relook Board procedure was an appropriate method of remedying the defect pursuant to the Secretary's broad remedial powers under 10 U.S.C. 1552 (Pet. App. 31-33). Specifically, the court found that the Relook Board was "an entirely reasonable attempt to mirror the statute's [10 U.S.C. 266] requirements in a fair manner" (*id.* at 32). The court did not decide whether the Relook Board was

---

[4]Petitioner also initially sought "actual damages," but later waived any claim to monetary relief (Pet. App. 23).

an entirely new selection board, but simply concluded that "[t]aken together, the relook board and the 1975 board can properly constitute a 'pass over' within the meaning of the regulations" (*id.* at 33).

ARGUMENT

Petitioner contends (Pet. 7-16) that the court of appeals erred in finding that he was properly released from duty and that its decision conflicts with *Dilley* v. *Alexander,* 603 F. 2d 914 (D.C. Cir. 1979). These contentions are without merit.

Although petitioner asserts (Pet. 9-15) that the decisions of the original 1975 selection boards are invalid, he does not suggest why the Relook procedure did not adequately remedy the defect. We submit that, for the reasons stated in its opinion, the court of appeals correctly concluded that the decision of the Relook Board provided a valid basis for petitioner's release from active duty by completely reconstructing the 1975 deliberations before a selection board containing Reserve officers. This decision is consistent with *Doyle* v. *United States,* 599 F. 2d 984 (Ct. Cl. 1979), cert. denied, No. 79-1315 (June 2, 1980), which held on similar facts that the determinations of the Relook Boards provided a valid basis for release from active duty.

Petitioner also contends that "[a]ll points raised in the appeal of Petitioner were raised in the *Dilley* case" (Pet. 7). This statement is completely without foundation. In *Dilley,* a case involving plaintiffs who had also been released from active duty after being passed over for promotion in 1975 and 1976, the court ruled that the Relook Boards were not an adequate remedy for the defect in the 1975 boards for two reasons: (1) the original deliberations were not precisely reconstructed because only primary zone officers were considered by the Relook

Boards and (2) the 1976 selection boards' deliberations were tainted by the decisions of the improperly constituted 1975 boards. 603 F. 2d at 924-925. Neither of these considerations was before the court of appeals in this case. As the court below noted (Pet. App. 27):

> [Petitioner] does not contest the 1976 Board's consideration. Cf. *Dilley* v. *Alexander,* 195 U.S. App. D.C., [332], [342], 603 F. 2d 914, 924 (1979) (reversal when 1976 board considered record erroneously including defective 1975 pass over). [Petitioner] does not question the relook board's consideration of only those officers in the primary zone. See *Dilley* v. *Alexander,* 195 U.S. App. D.C., at [342-343], 603 F. 2d at 924-25; *Doyle* v. *United States,* 599 F. 2d 984 (Ct. Cl. 1979).

Hence, the decision below does not conflict with *Dilley.*[5]

---

[5]The *Doyle* case also did not present the two problems that troubled the *Dilley* court. In *Doyle,* the plaintiffs had been passed over originally by the 1974 and 1975 boards, both of which were later reconstituted. And the plaintiffs were held to have waived any objection to the fact that the Relook procedure only included primary zone officers. See 599 F. 2d at 1001 n.15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General
WILLIAM KANTER
LOUIS R. DAVIS
Attorneys

AUGUST 1980

DOJ-1980-08